LABASAMA GROUP (M) SDN BHD

v.

INSOFEX SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: J-02-332-1995]
22 OCTOBER 1996

CONTRACT: *Sale and purchase of land - Breach - Purchaser claiming specific performance and damages - Claim for specific performance abandoned - Trial judge awarded purchaser damages without hearing arguments - Whether decision to award damages erroneous - Whether seller admitted liability for breach - Whether return of deposit an admission of liability - Whether there was a consent judgment - Whether triable issues raised by seller*

CONTRACT: *Breach - Remedies - Damages/specific performance - Whether damages and specific performance are alternative claims - Whether claimant's pleadings in respect of specific performance may be used for damages - Whether pleadings should have been amended*

According to the facts of the case, by a sale and purchase agreement, the plaintiff entered into an agreement with the defendant to purchase certain pieces of land ('the said property') for an agreed sum of RM1,709,072.50. The agreement was subject to the removal of a certain condition (condition 2) appearing in the issued documents of title to the said property where it was stated that 'the said property shall not be capable of being transferred or charged until the buildings have been duly erected and completed in accordance with the building plans approved by the appropriate authority.'

Part payment in the sum of RM136,000 was made to the defendant and part of the balance was to be paid after the removal of condition 2 and the remaining part of the balance within one year from the date of the last payment.

The defendant however failed to remove condition 2 and the plaintiff brought an action. The plaintiff initially filed an application for specific performance of the agreement against the defendant under O. 81 of the Rules of the High Court 1980 ('RHC') but abandoned that prayer after the defendant reimbursed RM136,000 and focussed their attention to the damages for breach of contract to be assessed by the senior assistant registrar under O. 37 of the RHC.

The High Court judge ordered the learned senior assistant registrar to assess damages allegedly suffered by the plaintiff (respondent) for an alleged breach of the sale and purchase agreement by the defendant. The defendant (appellant) now appeals.

Held:

Per Shaik Daud Ismail JCA

[1] The learned judge treated the matter as a consent judgment in that by repaying RM136,000 the appellant had consented to the prayer for damages for breach of agreement. The learned judge therefore had ignored the appellant's statement of defence and affidavit-in-reply where the appellant had explained why the impediment in condition 2 was not removed, and that this explanation had not been disputed by the respondent and thereby it had accepted the explanation. The appellant's defence therefore had disclosed triable issues. (p 265 b-d)

[2] The essence of the respondent's claim was for specific performance and once it had abandoned this claim, the respondent had altered its claim and its pleadings could not stand for the purpose of its alternative claim for damages for breach. The respondent therefore ought to have amended its pleadings and without having done so, the judge ought not to have ordered damages to be awarded to the respondent. (p 265 e-g)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Menurut fakta-fakta kes tersebut, melalui satu perjanjian jualbeli, plaintif telah memasuki satu perjanjian dengan defendan untuk membeli beberapa bidang tanah yang tertentu ('hartanah tersebut') bagi satu jumlah yang dipersetujui sebanyak RM1,709,072.50. Perjanjian tersebut adalah tertakluk kepada pembatalan satu syarat tertentu (syarat 2) yang terdapat pada dokumen hakmilik keluaran kepada hartanah tersebut di mana ianya menyatakan bahawa 'hartanah tersebut tidak boleh dipindahmilik atau digadai sehingga bangunan-bangunan telah didirikan dan disiapkan menurut pelan-pelan bangunan yang diluluskan oleh pihak berkuasa yang berkenaan'.

Sebahagian pembayaran yang berjumlah sebanyak RM136,000 telah dibuat kepada defendan dan sebahagian baki haruslah dibayar selepas pembatalan syarat 2 dan bahagian yang tinggal dari baki tersebut hendaklah dijelaskan dalam tempoh satu tahun dari tarikh pembayaran yang akhir.

Defendan walau bagaimanapun telah gagal membatalkan syarat 2 dan plaintif telah memulakan satu tindakan. Plaintif pada awalnya memfailkan satu permohonan untuk perlaksanaan spesifik perjanjian terhadap defendan di bawah A. 81 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') tetapi meninggalkan permohonan itu selepas defendan membayar balik RM136,000 dan menumpukan perhatian mereka kepada gantirugi untuk keingkaran kontrak supaya ditaksirkan oleh penolong pendaftar kanan di bawah A. 37 KMT.

Hakim Mahkamah Tinggi telah memerintahkan supaya penolong kanan pendaftar menaksirkan gantirugi yang didakwa telah dialami oleh plaintif (responden) kerana keingkaran perjanjian jualbeli oleh defendan. Defendan (perayu) kini merayu.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Hakim yang bijaksana menganggap perkara tersebut sebagai penghakiman persetujuan iaitu dengan membayar balik RM136,000, perayu telah bersetuju dengan permohonan untuk gantirugi perjanjian tersebut. Hakim yang bijaksana dengan itu telah tidak menghiraukan pernyataan pembelaan dan afidavit jawapan perayu di mana perayu telah memperjelaskan mengapa penghindaran dalam syarat 2 tidak dibatalkan dan bahawa penjelasan ini telah tidak dipertikaikan oleh responden dan dengan itu ia telah menerima penjelasan tersebut. Pembelaan perayu dengan itu telah mendedahkan isu-isu yang boleh dibicarakan.

[2] Intipati tuntutan responden adalah untuk perlaksanaan spesifik dan sebaik sahaja ia telah meninggalkan tuntutan ini, responden telah mengubah tuntutan ia dan rayuan ia tidak boleh kekal untuk tujuan tuntutan alternatif ia untuk gantirugi bagi keingkaran. Responden dengan itu sepatutnya telah meminda plidingnya dan tanpa melakukan yang sedemikian hakim tidak sepatutnya memerintahkan supaya gantirugi diberikan kepada responden.

[Rayuan dibenarkan.]

Case(s) referred to:
Hipgrave v. Case [1885] 28 Ch D 356 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 37, O. 81

For the appellant - C Kumareson; M/s Saga & Assoc
For the respondent - Gana Muthusamy; M/s Gana Muthusamy & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-456-1993]

[Editor's note: This judgment dated 22 October 1996 was received on 9 May 2000]

Reported by Mariette Peters-Goh

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court sitting in Johor Bahru which had ordered the learned senior assistant registrar to assess damages allegedly suffered by the respondent for an alleged breach of a sale and purchase agreement by the appellant. The facts leading to this order being made are not in dispute. By a sale and purchase agreement dated 8 February 1992 the appellant as the beneficial proprietor of some parcels of land in the Mukim of Tebrau, Johor Bahru, agreed to sell the said lands to the respondent at an agreed sum of RM1,709,072.50. The respondent made part payment of a sum of RM136,000 to the appellant. The respondent also agreed to pay a sum of RM629,228.90 on or before 31 January 1993 subject to the removal of condition 2 appearing in all the issue documents of title. This condition states "the said property shall not be capable of being transferred or charged until the buildings have been duly erected and completed in accordance with the building plans approved by the appropriate authority." Under the sale and purchase agreement the respondent undertook to pay the balance of the purchase price of RM821,843.70 within one year from the date of the last payment.

The respondent, after having paid the initial RM136,000, were at all material times ready, able and willing to complete the agreement and towards this end lodged a caveat over the said lands. Despite several requests and demands, the appellant refused or failed to have the above mentioned condition removed from the issue documents of title and consequently this refusal or failure prevented the respondent from completing the agreement. This prompted the respondent to file a summons-in-chambers for specific performance of the agreement against the appellant under O. 81 of the Rules of the High Court 1980. In their application the respondent prayed *inter alia* for specific performance, damages for delay in handing over possession of the lands and the senior assistant registrar be directed to assess damages for breach of contract pursuant to O. 37 of the Rules.

At the hearing of the application in chambers, learned counsel for the respondent decided to abandon the respondent's prayer for specific performance, after the appellant reimbursed the RM136,000. In the light of

this, what is left is the prayer for damages for breach of contract which is to be assessed by the senior assistant registrar.

Immediately after the learned counsel for the respondent informed the court of the respondent's desire to abandon the prayer for specific performance the learned judge, without hearing the matter further on the merits, made an order directing the senior assistant registrar to assess the damages. By doing this it would appear that the learned judge assumed, without hearing any evidence on merits, that the appellant was liable for breach of the agreement. On our perusal of the judgment of the learned judge, it seems clear that the learned judge treated the matter as a consent judgment in that by repaying the RM136,000, the appellant had consented to the prayer for damages for breach of the agreement. The learned judge appeared to have ignored the appellant's statement of defence and affidavit in reply where the appellant had explained why the impediment to condition 2 was not removed and that this explanation had not been disputed by the respondent and thereby they had accepted the explanation. It is clear that the appellant's defence had raised triable issues as to whether they had breached the agreement. It would also appear that the learned judge misconstrued the appellant's consent to the abandonment of the prayer for specific performance by the respondent as being consent to be liable for damages.

The essence of the respondent's claim in the circumstances of this case is for specific performance and the claim for damages for breach of agreement must necessarily be regarded as an alternative claim. They cannot get both remedies. If they claim for specific performance, they are treating the agreement as still subsisting and wants the other party to perform it. If their claim is for damages for breach, they are treating the agreement as having come to an end and therefore incapable of being performed. As stated earlier the essence of the respondent's claim is for specific performance and once they abandon this claim, they have altered their claim and their pleadings cannot stand for the purpose of their alternative claim for damages for breach. They therefore ought to amend their pleadings and without doing so, the learned judge ought not to have ordered damages to be awarded to them. The respondent cannot be allowed to change the whole nature of their claim which essentially is a claim for specific performance, by turning it into an ordinary action for damages. (See *Hipgrave v. Case* [1885] 28 Ch. D 356).

In the circumstances of this case, we are of the view that the learned judge erred in law in ordering the assessment of damages. We accordingly allowed the appeal with costs, set aside the order of the learned judge and ordered the deposit to be refunded to the appellant.